

Potential Amendments to the Mining Law and the National Waters Law

Mexico City, April 10, 2023

On March 28, 2023, the Mexican President submitted an initiative to amend the Mining Law and the National Waters Law which, if approved as proposed, would impact materially the mining industry in Mexico (the "Initiative").

I. Main amendments, additions, or modifications to the Mining Law

a) Reduction of the duration of mining concessions.

The Initiative would change the duration of mining concessions from 50 years, renewable once for a total maximum of 100 years, to 15 years, renewable once for a total maximum of 30 years. The Initiative remains silent on what would happen if at the end of the second renewal period the mine in operation still has sufficient reserves that can be exploited (which is likely to occur, considering the length of the exploration and construction period). It is worth mentioning that such time restriction would not apply to mining concessions operated by public or state-owned entities (for the extraction of Lithium for instance).

b) Elimination of the possibility for individuals to request concessions on free land on a first-come-first-serve basis, and replacement by a public tender process.

The Initiative provides that any new concession shall be granted through a public tender process instead of being issued to the first Mexican entity or individual requesting it. In order to participate in the tender process, all applicants would need to take on certain commitments that ensure economic improvements for the surrounding communities and the environment. Such change would mean that applicants would have to rely heavily on the information provided by the Mexican authorities, especially the Mexican Geological Service (SGM). Such reliance would require that the SGM does the pertinent exploration work, devoting human and economic resources that it currently does not have to complete such work. Such change would shift the risk involved in the exploration work

from the private sector to the Mexican government (assuming that the SGM or any other authorities effectively assumes this role).

c) Restriction to the extraction of certain minerals or substances expressly authorized by the Concession.

According to the Initiative, mining concessions would expressly state the type of minerals that may be extracted from the mining lots. Such change would be particularly challenging in practice as any applicant for a mining concession would not be able to complete exploration works prior to participating to the tender process to receive the mining concession. Applicants would then need to rely on the results of the exploration works done by the authorities, if any, and would not benefit from the extraction of any mineral that was not previously anticipated; however, bearing the cost of it. Although not expressly mentioned in the Initiative, such change could also open the door to the granting of several mining concessions on the same land to the extent it is for different minerals. The Initiative expressly states that in the event a concession holder extracts minerals not authorized pursuant to its concession, such minerals shall be delivered to the Mexican government; however, the Initiative does not specify whether the concession holder would receive any compensation for delivering such minerals. Such approach (which is a return to what was applicable in previous versions of the mining law) has already been deemed impractical, as it is common for mining extraction processes to extract a good number of minerals and substances from the same mined area, given that the extraction of each mineral cannot be carried out separately.

d) Authorization for the mining concessions assignments.

Any assignment of mining concessions would be subject to prior authorization from the Ministry of Economy. Such Ministry would confirm whether the concession holder is in compliance with the provisions of the Mining Law to authorize such assignment. Any private agreement whereby the concession could be assigned could be deemed null and void. Consequently, any existing lien over mining concessions could be rendered unenforceable, adversely impacting existing financings of mining operations in Mexico.

e) Elimination of the possibility to request use rights over the corresponding lands.

The Initiative would eliminate the right of any concession holder to request to the authorities the expropriation of, or the right to use, the land covered by the mining concession for exploration and extraction activities (in the event an agreement cannot be reached with the owner of such land). Once the concession is secured, the holder would

need to execute the corresponding land agreements with the owner of such lands (whether individuals or indigenous communities), in the understanding that the authorities would only deliver the mining concession title once an agreement with the corresponding owner of the land is reached and delivered to the authorities. It is worth mentioning that when the required land is owned by indigenous communities, the concession holder would need to pay to such communities at least 10% of its income in consideration for the use of such land.

f) New social and indigenous consultation obligations.

The Initiative provides that the granting of a new mining concession would be subject to social impact studies and indigenous consultation of the affected communities. The obligation to consult indigenous communities is already established in the Federal Constitution and international agreements ratified by the Mexican State (ILO 169) and therefore, the Initiative would only be establishing the obligation in a general law.

g) New environmental obligations.

The Initiative bans the granting of new mining concessions and/or undertaking mining activities on: (i) areas without proven water availability; (ii) riverbanks, water bodies, seabed, federal maritime zone, and alluvial land claimed from the sea; and (iii) natural protected areas (NPA). It further establishes that existing mining concessions within the limits of NPA would not be extended, becoming extinct at the end of their original validity term.

During the life of the concession, the holder would also be subject to additional environmental obligations, including providing information to the mining authorities regarding the status of its environmental permits and authorizations, as well as the preparation and updating of a Closure, Decommissioning and Remediation Plan regarding the mining operation. The Initiative would also require the concession holder to have a letter of credit in order to guarantee any potential damage to the environment resulting from the mining operation.

h) Additional conditions pursuant to which concession could be cancelled.

The causes pursuant to which the mining authorities are entitled to cancel mining concessions would be substantially increased, including not holding the corresponding water concession specific for mining purposes or the existence of immediate risk to the environment. Also worth noting that the Initiative eliminates the right of the holder of a

mining concession to use the water resulting from the working of the mine. The right to use this water would need to be obtained through a water concession title granted by the National Water Commission (CONAGUA).

II. Main amendments, additions, or modifications to the National Waters Law

a) Water concession for specific mining use.

The Initiative creates a new regime of water use, specific for mining activities, which expands on the water uses already foreseen in the Law and its Regulations (domestic, urban, agriculture, power generation and other productive uses). This new “mining use” regime for water, provides additional obligations to obtain and maintain a water concession, such as providing the authorized Mine Closure, Decommissioning and Remediation Plan, undertake monthly measurements of quantity and quality of water and a technical assessment of the methods and uses of water resulting for the working of the mine.

The Initiative also establishes a prohibition to assign water concession rights when the acquirer intends to change the authorized use of water to “use in mining”, thus making it impossible for mining companies to have access to available water that is not being used by the third parties.

b) Grounds for denial of a water concession for mining use.

The Initiative mandates CONAGUA to reject applications for water concessions for mining use, in case that the applicant concentrates more than 30% of the total availability of water in the basin, or in case that the mining use may put at risk water availability for other uses. It is worth mentioning that the Initiative is silent on the basis for providing the 30% figure, which seems arbitrary and not science-based.

c) Reduced validity timeframe of water concessions for mining use.

The Law currently provides a validity timeframe for water concessions of 5 to 30 years, which can be extendable for a period similar to the one originally granted. The Initiative, however, specifically provides that water concessions for mining use may only be issued for a maximum period of 5 years, which may be extended once for a similar timeframe. This provision is inconsistent with the maximum validity periods of the mining concessions of 30 years. This contradiction would make it impossible to maintain or renew the mining

concession for 30 years, given the water concession title would only be valid for a maximum of 10 year.

The additional restrictions for the use water in mining are not justified on the basis of the allocation of water concessions for different activities. According to the Institute of Statistics and Geography (INEGI) mining is by far, not the largest consumer of water in the country, the largest is agriculture, followed by domestic use and lastly the industrial sector, which includes mining, with only 4.9% of the water concessions.

III. Conclusion

We consider that several articles of the Initiative are unconstitutional given that they contravene fundamental principles and rights such as: legal certainty, legitimate trust, legality, non-retroactivity of the law, equality, free competition and undue discrimination. Likewise, we consider the obligation of the Mexican government to guarantee a sustainable development and promote economic growth and employment could be contravened. If the Initiative described above becomes law, parties affected by the transitory provisions could resort to an amparo proceeding within the next 30 days after the law becomes effective, seeking the annulment of the changes to their obligations as concessionaries or the dismissal of their applications filed under the previous legal provisions. Likewise, all the parties affected by the amendments could challenge the relevant provisions through an amparo proceeding, within the next 15 working days after being served with the first authority act enforcing the amendments.

In addition, we consider that several international treaties could be violated, particularly Bilateral and Multilateral Investment Treaties which are aimed at granting fair and equitable treatment and national treatment to foreign investors and offering a stable legal environment to them when investing in the host country. It is worth mentioning that, when defining a legal strategy, a foreign investor shall consider the regulation of fork-in-the-road provisions to avoid potential waivers of investment protection under Bilateral and Multilateral Investment Treaties.

The Initiative is yet to be proposed for consideration, discussion and possible amendments and approval by the House of Representatives (*Cámara de Diputados*). If approved, it must be turned over to the Senate (*Cámara de Senadores*) for its discussion, possible changes and, if applicable, its approval. A simple majority is required for either the passing or rejection of the Bill at both chambers.

This communication is intended to provide a general overview of the Initiative.

At Galicia we are prepared to accompany you in the analysis of the Initiative and, if necessary, develop strategies and defense mechanisms that can protect your business and the continuity of your operations.

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